UNITED OVERSEAS BANK LTD.

v.

YAUW ENTERPRISE PTE. LTD.

COURT OF APPEAL, SINGAPORE
LP THEAN J
CHAN SEK KEONG J
WARREN LH KHOO J
[CIVIL APPEAL NO. 26 OF 1988]
7 NOVEMBER 1991

LAND LAW: *Conveyancing - Sale and purchase of units in ground and mezzanine floor of building - Different adjustments by parties - Whether purchase price should include 'void or notional area' of mezzanine floor - Meaning of "mezzanine floor, "floor area" and "insofar as the area ... is more or less than the estimated area by 5%" - Terms not defined in agreement - Ordinary meaning - Void or notional area not included.*

By an agreement dated 24 April 1981 made between them, the defendant agreed to sell and the plaintiff agreed to purchase certain number of office/shop units on the ground and mezzanine floors of GSM Building. Pursuant to Clause 26 of the said agreement the area of the said unit was only an estimate. The purchase price was to be adjusted on the completion of the government resurvey. Both parties made different adjustments. The mezzanine floor area consisted of the actual floor area and the void space, which is that notional floor area at the front of the building extending from the edge of the mezzanine floor over the space below to the wall of the building (called the 'void' area.)

The trial Judge dismissed the plaintiff's application for abatement in the purchase price and held that the void area ought to be included in the computation of the purchase price; hence this appeal.

The dispute was whether in making an adjustment of the purchase price under Clause 26, the void area ought to be included as a part of the mezzanine floor area.

Held:

[1] The agreement does not contain any definition or any provision giving a special meaning of the terms "mezzanine floor "and "floor area". These terms must be given their ordinary meaning, unless the context in which they appear dictates otherwise.

[2] Giving them the ordinary meanings, the term "mezzanine floor" means a floor between two floors, usually the first and second floors and extends over and covers a part only of the floor immediately below, and does not include any void or notional area which does not form part of the floor.

[3] Similarly the term "floor area" means the area of the actual floor and any void space or notional part thereof cannot form any part of the floor area.

[4] If the parties intended that the area of the mezzanine floor should include the actual floor area and the void area, they would have done so by express terms in the agreement since the distinction between them was fully within their contemplation, given the void area that was clearly demarcated on the plan showing and delineating the mezzanine floor.

[5] On the true construction of the agreement, the void area is not part of the floor area of the mezzanine floor included in the estimate area provided in Clause 3 and ought not to be taken into account in adjusting the purchase price under Clause 26.

[6] Giving full effect to the words, "insofar as the area ... is more or less than the estimated area by 5%" only the excess or shortfall over 5% of the estimated area should be taken into account in the adjustment of the purchase price. Having regard to Clause 26, the parties clearly intended that if the difference between the estimated area and the survey area does not exceed 5% there would be no adjustment.

[Plaintiff's appeal allowed with costs; order of High Court varied in relation to sum payable by plaintiff.]

For the appellant - Johnny Cheo
For the respondent - Lai Lay Kim

JUDGMENT

LP Thean J:

The plaintiffs are a bank, and the defendants are a property developer and at all material times were the developer of what is now the six-storey office/shop complex known as the GSM Building in Middle Road, Singapore. By an agreement dated 24 April 1981 made between them, the defendants agreed to sell and the plaintiffs agreed to purchase free from encumbrances:

> **All That** the residue of the leasehold estate of a term of 99 years commencing from 2 May 1978 in part of **All That** piece of land comprising the office/shop unit (hereinafter called "the said unit") described in the First Schedule hereto being part of the premises on the Ground, Mezzanine floor of the building known as or to be known as "GSM Building" (hereinafter referred to as "the said building") now being developed by the vendor under approved building plan PP No. 3191/79.

The said unit as described in the first schedule to the agreement is as follows:

> All that office/shop on the Ground, Mezzanine floor of the building "known as GSM Building" erected or in the course of erection on all those piece of land marked on the Government Resurvey Map as Lots 72-2pt, 73-4pt, 72-5pt, 70-3, 70-4, 70-5, 70-6, 70-7, 71 and 202 of Town Subdivision XI (being all the land known as Land Parcel 66 in Urban Redevelopment Sales Scheme) and comprised in a State Lease to be issued for a term of 99 years computed from 2 May 1978 which office/shop space is estimated to contain a floor area of square meters (square feet) and is more particularly shown and delineated on the plan annexed herewith and provisionally known as Unit/Units No./Nos. 1, 2 & 3 Ground & Mezzanine Floor, GSM Building, Middle Road/Waterloo Street, Singapore.

We shall refer to the said unit as "Lot 332/U2", as that is the subsidiary lot designated in the subsidiary strata certificate of title subsequently issued. The estimated area of Lot 332/U2 is not set out in the first schedule (the schedule), and the reason for this is probably that it is set out in Clause 3 of the agreement. Clause 3 reads as follows:

> The purchase price shall be Dollars Three Million Ninety Nine Thousand and Twenty only ($3,099,020-00) which is calculated at the rate of Dollars Five Hundred ($500-00) per square foot (2,200 sq.ft. for Ground floor), Dollars Five Hundred & Seventy ($570-00) per sq foot (1,825.20 sq.ft) for additional Ground floor) and Dollars Three Hundred ($300-00) per square foot (3,195.52 sq.ft. for Mezzanine Floor).

The purchase price under Clause 3 is subject to adjustment as provided in Clause 26, which is in the following terms:

> The area of the said unit as mentioned in the Schedule hereto is only an estimate. In the event of any difference in the area on completion of Government Resurvey of the said unit, the purchase price shall be adjusted insofar as the area upon survey is more or less than the estimated area by 5%. The actual area on resurvey is to follow the surveyed areas shown on certified plans approved by the chief surveyor.

The GSM building was constructed over the following years and subsidiary strata certificates of title to the various units of the building were issued, and in respect of Lot 332/U2, the subsidiary strata certificate of title (strata title) was issued on 29 March 1984 to the defendants. The relevant part of the strata title states as follows:

> Yauw Enterprise Pte. Ltd. of 6th floor, Chiat Hong Building, No. 110, Middle Road, Singapore, is the subsidiary proprietor of a **Leasehold estate** for the unexpired portion of a term of 99 years commencing from 2 May 1978...in **All** that piece of land situated in **Town Subdivision No. 11, Singapore** being **Lot 332/U2** containing a floor area of 703 sq. m. or thereabouts and bounded as appears in the plan annexed hereto **Which** said Lot is delineated on Strata Certified Plan No. ST. R.T 1249...

The floor area of 703 sq. m. (that is 7,567.092 sq. ft.) as stated in the strata title is made up of the following:

(i) 353 sq. m. (that is 3,799.692 sq. ft.) for the ground floor, and

(ii) 350 sq. m. (that is 3,767.400 sq. ft.) for the mezzanine floor.

These areas appear on the strata plan annexed to the strata title. On the basis of the areas contained in the strata plan, the defendants asked for payment from the plaintiffs of a total sum of $823,020.78 made up as follows:

Balance of the purchase price (Clause 4 (2)(b) of the agreement)	$774,755.00
Fees for Government survey and plans	$ 5,241.34
Add: Difference in area for mezzanine floor based on: New area: 3,767.40 sq.ft. (350 sq.m.) minus old area: 3,195.52 sq.ft.= 571,880 sq.ft.@ $300 per sq.ft.	$171,564.00
	$951,560.34
Less: Difference in area for ground floor based on: Old area: 4,025.20 sq.ft. minus new area: 3,799.692 sq.ft. (353 sq.m.) = 225.508 sq.ft. @ $570 per sq.ft.	$128,539.56
	$823,020.78

The adjustments were purportedly made in accordance with Clause 26 of the agreement; we say "purportedly" because the adjustments were not made strictly in accordance with Clause 26, as we shall explain in a moment. These adjustments were not accepted by the plaintiffs; they in turn made their own adjustments also purportedly in accordance with Clause 26, and they tendered payment of sum of $651,456.78 arrived at as follows:

Balance of purchase price (Clause 4(1)(1) of the agreement)	$774,755.00
Fees for government survey and plans	$ 5,241.34
	$779,996.34

Less difference for ground floor	$128,539.56
	$651,456.78

There is no dispute over the shortfall in the area of the ground floor. The strata title plan shows that the area of the mezzanine floor is 350 sq. m. This is not disputed. It is also not disputed that this area consists of the actual floor area and the void space, which is that void area at the front of the building extending from the edge of the mezzanine floor over the space below to the wall of the building. In other words, it is the notional floor area of the mezzanine floor extending over the space below to the wall of the building, and we shall call this the "void area". After the issue of the strata title to Lot 332/U2 the plaintiffs obtained a Government resurvey plan which shows that the area of the actual mezzanine floor is 267 sq.m. (2,873.99 sq.ft.) and that of the void area is 83 sq.m. (893.41sq.ft). The quantifications of these area are, again, not in dispute. The dispute is whether in making an adjustment of the purchase price under Clause 26 the void area ought to be included as a part of the mezzanine floor. The plaintiffs' case is that the purchase price for the mezzanine floor is to be calculated on the basis of the actual floor area excluding the void area, whereas the defendants' case is that the total area including the void area of the mezzanine floor should be accepted for the purpose of calculating the purchase price. On 9 October 1986, the plaintiffs took out an originating summons, which as amended, claimed for declarations that they were entitled to an abatement of $96,459 in the purchase price, that the defendants be precluded from claiming further moneys from them under Clause 26 and that they had wholly performed the obligations in terms of agreement. The claim was resisted by the defendants who, in turn, counterclaimed for the sum of $171,564 as the balance of the adjusted purchase price.

The originating summons was heard before FA Chua J, who dismissed the application with costs and ordered the plaintiffs to pay to the defendants the sum of $171,564 with interest thereon. The learned Judge held that the void area of 893.41 sq. ft. ought to be included in the computation of the purchase price. His reasoning is contained in the following part of his judgment:

> During the negotiations stage, the plaintiffs wanted to purchase what was actually three separate shop units consisting of the ground floor and the mezzanine floor. It was the plaintiffs' intention to convert the three units into one to serve their use as a bank. Plans were drawn on the instructions of the plaintiffs and the three units have now become one single unit. The plaintiffs wanted a bigger space above the ground floor to serve as the banking hall thereby creating the void space between the mezzanine floor and the ground floor. The discussions were concluded on a set of plans which were accepted and approved by the plaintiffs and annexed to the agreement...
>
> It seems to me that it was the intention of the contracting parties to sell and to purchase the entire three units with the area as set out in Clause 3 of the agreement. If, as contended by the plaintiffs, both parties had intended not to include the void space in their measurements, then, it seems to me, the area of the mezzanine floor as stipulated in the Clause 3 could not have been set out to be 3,195.52 sq.ft (296.85 sq m).
>
> If the three units had not been sold to the plaintiffs, they would probably have been sold to separate purchasers and the defendants would have been paid for the 571.88 sq.ft. The plaintiffs contend that they have no use for the void space, but they are in fact enjoying the void space as the banking hall has a higher ceiling constructed at their request and they do not now want to pay for it.
>
> The plaintiffs are not correct in their contention that the basis for computation of the price for the unit is on the actual floor area.

Against the decision of the learned Judge, this appeal is now brought. The issue turns on the construction of the agreement and in particular the provisions of Clauses 1, 3, and 26 of the agreement and the schedule. Clause 1 refers to Lot 332/U2 as the unit described in the schedule being part of the premises "on the ground, mezzanine floor" of GSM building. The Schedule then describes Lot 332/U2 as "all that office/shop on the ground, mezzanine floor" of the GSM building, "which office/shop space is estimated to contain a floor area of square metres (square feet) and is more particularly shown and delineated on the plan" annexed to the agreement. As we have stated, the estimated areas of the ground and mezzanine floors do not appear in the schedule, but Clause 3 gives a breakdown of the areas and the purchase price for Lot 332/U2 as follows.

Ground floor 2200 sq.ft. at $500 p.s.f.	=	$1,100,000
Additional Ground floor 1825.20 sq.ft. at $570 p.s.f.	=	$1,040,364
Sub total 4025.20 sq.ft.		$2,140,364
Mezzanine Floor 3195.52 sq.ft. at $300 p.s.f.	=	$ 958,656
Total purchase price		$3,099,020

It seems to us that though the Schedule expressly refers to the estimated "floor area", it is really Clause 3 which sets out the estimated floor areas of the ground floor and the mezzanine floor respectively and also the breakdown of the purchase price.

The plans for the ground floor and mezzanine floors are supposed to have been annexed to the agreement. No such plans, however, have been annexed. The parties have produced a set of plans which were said to have been agreed between them as the plans for Lot 332/U2 at the time of the execution of the agreement. As regards these plans, the plan for the ground floor shows and delineates the ground floor from wall to wall; the plan for the mezzanine floor shows where the floor area and the void area were to be; the delineation of the mezzanine floor for the purpose of the schedule and Clause 3 is rather equivocal.

The agreement does not contain any definition or any provision giving a special meaning of the terms "mezzanine floor" and "floor area". These terms, as they appear in the agreement, must therefore be given their ordinary meanings, unless the context in which they appear dictates otherwise. Giving them the ordinary meanings, the term "mezzanine floor" means a floor between two floors, usually the first and second floors, and extends over and covers a part only of the floor immediately below, and does not include any void or notional area which does not form part of the floor, and similarly the term "floor area" means the area of actual floor and any void space or notional part thereof cannot form any part of the floor area. The term "mezzanine floor" in the context in which it appears in Clauses 1 and 3 and the Schedule, cannot be construed otherwise than in the ordinary sense; the same construction ought to be given to the term "floor area" in the Schedule.

There was no evidence adduced to show how the areas of the ground floor and the mezzanine floor were arrived at. In all probability they were calculated expertly by the defendants' architects from their plans (which were drawn to scale). We can only infer that so far as the ground floor is concerned the architect must have taken the actual floor area from wall to

wall. As for the mezzanine floor, he must have taken only the actual floor area without including the void area. That this must be so is borne out by the estimated areas of the ground floor and mezzanine floor, namely, 4,025.20 sq.ft. and 3,195.32 sq.ft. respectively. If the void area was included as part of the floor area, the area of the mezzanine floor would be substantially the same as that of the ground floor or at most would be slightly less than the area of the ground floor, and it would be difficult to account for the huge discrepancy of 829.88 sq.ft. between the area of the ground floor and that of the mezzanine floor.

It seems to us that if the parties intended that the area of the mezzanine floor should include the actual floor area and the void area they would have done so by express terms in the agreement since the distinction between them was fully within their contemplation, given the void area that was clearly demarcated on the plan showing and delineating the mezzanine floor. In our judgment, on the true construction of the agreement, the void area is not part of the floor area of the mezzanine floor included in the estimated area provided in Clause 3 and ought not to be taken into account in adjusting the purchase price under Clause 26.

There is one further point which should be considered. Both parties in seeking the adjustments of the purchase price under Clause 26 took the total area representing the difference between the areas given in Clause 3 and those given in the survey plan. In our opinion, on the true construction of Clause 26, such an adjustment is not correct. Clause 26 provides that in the event of any difference in the areas on completion of Government Resurvey of Lot 332/U2, the purchase price should be adjusted **insofar** as the area upon survey is **more** or **less** than the estimated area by 5%. Giving full effect to the words, **insofar** as the area ... is **more** or **less** than the estimated area by 5%, we think that only the excess or the shortfall over 5% of the estimated area should be taken into account in the adjustment of the purchase price. By that clause, the parties clearly intended that if the difference between the estimated area and the resurvey area does not exceed 5% there would be no adjustment.

For the reasons we have given, the adjustment to the purchase price should be as follows:

Ground floor			
Area of shortfall	:	225.508 sq. ft.	
5% of the estimated area	:	201.26 sq. ft.	
Excess		24.248 sq. ft.	
24.248 sq.ft.at $570 p.s.f.:			$13,821.36
Mezzanine floor			
Area of shortfall	:	321.53 sq. ft.	
5% of the estimated area	:	159.776 sq. ft.	
Excess		161.754 sq. ft.	
161.754 sq.ft.at $300 p.s.f:			$48,526.20
		Total	$62,347.56

On these calculations, the total amount to be deducted from the purchase price is only $62,347.56. Accordingly, on completion, the plaintiffs ought to have paid $717,648.78 made up as follows:

Balance of purchase price	$774,755.00	
Fees for Government resurvey	$ 5,241.34	
	$779,996.34	
Less the amount of shortfall in the ground and mezzanine floors	$ 62,347.56	
	$717,648.78	

This amount exceeds by $66,192 the amount which the plaintiffs contended they should pay, that is $651,456.78, and which they did pay prior to the order of the High Court. Accordingly, we vary the judgment of the High Court as follows: we order that the plaintiffs pay to the defendants the sum of $66,192 plus interest thereon at 12% from 5 June 1984 to the date of judgment in the High Court. We understand that the plaintiffs have paid to the defendants in full the amount ordered by the High Court. Therefore, there will be a consequential order for refund of the excess of the amount which the plaintiffs are now ordered to pay.

We now come to the question of costs. On the basis of the adjustments we have made, the plaintiffs would still have failed substantially in their claim before the High Court. We therefore would not disturb the order as to costs made by the High Court. As regards the appeal, the plaintiffs have succeeded, though not to the full extent as they have contended. In the circumstances, we would allow them two-thirds the costs of the appeal. We therefore order accordingly. There will be usual consequential order for refund to the plaintiffs of the deposit paid as security for costs.

Also found at [1992] 1 CLJ 246